Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

December 2005

Healthcare contracts must prominently display arbitration clause or they will not be enforced. *Health & Saf. Code* § 1363.1 requires that arbitration clauses in health care plans be "prominently displayed" and be placed "immediately before the signature line provided." If the contract does not comply with these requirements, the arbitration clause will not be enforced.

Katrina survivors need your help

Your legal expertise or other personal services are needed to assist in the recovery and rebuilding of the Gulf Coast.

Anyone able to contribute their legal skills ot other personal services to the Red Cross can contact Mary C. Dollarhide of Paul Hastings, San Diego at **marydollarhide@paulhastings.com**. Please note "**American Red Cross/Katrina Legal Support**" in the subject line and provide the following information:

1. areas of legal expertise where you might assist the Red Cross (e.g., tax, real estate, licensing, criminal, etc.)
2. names of lawyer volunteers (organized under areas of legal expertise) and jurisdictions in which you are licensed and could provide advice
3. other information you believe may be of use in assisting Red Cross national headquarters.

This information will be provided to the Red Cross which will in turn contact you.

Robertson v. Health Net of California, Inc. (Cal. App. First Dist., Div. 2; August 31, 2005) (ord. pub. September 28, 2005) 132 Cal.App.4th 1419, [34 Cal.Rptr.3rd 547, 2005 DJDAR 117450].

Another court weighs in on the application of Proposition 64 to pending cases. The California Supreme Court has granted hearing in all previously published opinions dealing with the application of Proposition 64 (limiting plaintiffs' ability to bring actions under California's Unfair Competition Law, *Bus. & Prof. Code* §§ 17200 ff.) to pending cases. The lead case in the Supreme Court is *Disability Rights v. Mervyns, LLC*, case number S13222. Meanwhile courts have had to resolve the issue in cases now before them. Previously, all but one of the Court of Appeal decisions (*Mervyns*) had held that Proposition 64 applied in cases that had not yet gone to judgment on the effective date of the initiative. *Schwartz v. Visa International Service Association* (Cal. App. First Dist., Div. 2; September 28, 2005) 132 Cal.App.4th 1452, [34 Cal.Rptr.3d 449, 2005 DJDAR 11801] may be added to this list. It is almost certain that our Supreme Court will grant review in *Schwartz* and hold the case till it decides the *Mervyns* case.

Not every appellate reversal entitles you to a different judge. *Code of Civ. Proc.* § 170.6 provides that when a case is remanded to the trial court by the appellate court for a "new trial," a party may file another affidavit of disqualification and have the matter heard by another judge. But what is meant by a "new trial?" In *Burdusis v. Sup.Ct. (Rent-A-Center, Inc.)* (Cal. App. Second Dist., Div. 7; October 5, 2005) 133 Cal.App.4th 88, [34 Cal.Rptr.3rd 575, 2005 DJDAR 11997], the court held that the reversal of the denial of class-action status and remand to the trial court for reconsideration did not constitute a remand for a "new trial." The court stated that where a proceeding does not address the merits, there is no right to a peremptory challenge.

Class Action Fairness Act (CAFA) does not apply to cases pending before its effective date. CAFA amended the federal diversity statute, effective last February 18. With some other limitations, the act vests original jurisdiction for class actions in federal court where the amount in controversy exceeds $5,000,000. The act does not apply to cases pending before the effective date of the statute. *Bush v. Cheaptickets* (9th Cir.; October 6, 2005) 425 F.3d 683, [2005 DJDAR 12011].

Report of possible crime is privileged. *Civ. Code* § 47(b) bars a civil action for damages based on statements made in an official proceeding. This includes a report to the police wherein defendant reported a possible crime. Therefore the ruling of the trial court in sustaining defendant's demurrer without leave to amend was affirmed, even though plaintiff

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alleged that an unfounded police report was filed in retaliation for his having reported misconduct by defendant. *Brown v. Department of Corrections* (Cal. App. Third Dist.; August 31, 2005) 132 Cal.App.4th 520, [33 Cal.Rptr.3rd 754, 2005 DJDAR 10824].

California adopts "sophisticated user" doctrine. Under the "sophisticated user" doctrine, a manufacturer was held to be entitled to summary judgment in its favor in a "failure to warn" case where the injured plaintiff was a "sophisticated user" and as such, he should reasonably have known of the risk. In *Johnson v. American Standard, Inc.* (Cal. App. Second Dist., Div. 5; October 17, 2005) 133 Cal.App.4th 496, [34 Cal.Rptr.3d 863, 2005 DJDAR 12366], the Court of Appeal relied on a number of cases from other jurisdictions to reach this conclusion. The case involved a certified HVAC (heating, ventilation, and air conditioning) technician who was injured by escaping gas while repairing an air conditioning system.

Because this doctrine appears to be new in California law, it is not unlikely that our Supreme Court will grant review.

State Bar gains authority to fight unauthorized practice of law. The State Bar Office of Governmental Affairs reported that SB 894 (Senator Joe Dunn), signed by Governor Schwarzenegger, authorizes the State Bar to pursue the unauthorized practice of law by non-lawyers, using the same civil remedies available to it as in cases of disbarred, or resigned lawyers. The new legislation permits the Bar to seek an order from the superior court to assume jurisdiction of the illegal practice and to assist the court in returning files to clients and assist the clients in finding other counsel. Existing criminal penalties for the unauthorized practice of law remain unchanged.

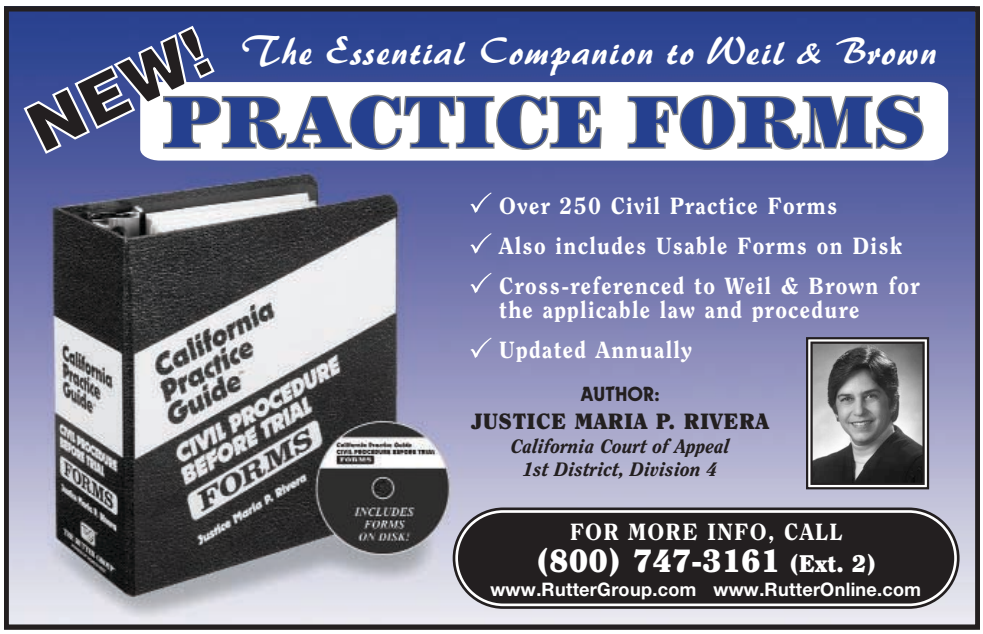
If you discover evidence of a non-lawyer practicing law in this state, we recommend you report this to the State Bar as well as to the local District Attorney.

Biological father lacks standing to assert paternity to child conceived during mother's marriage. *Fam. Code* § 7630 (Uniform Parentage Act) specifies the persons who have standing to file an action to determine paternity. This includes the child, the natural mother, or a "presumed father." Section 7611 lists the conditions under which a man is presumed to be the father. Under this section the man to whom the mother is married or, if no longer married, if the child is born within 300 days of the termination of the marriage, is the presumed father. Another presumed father is one who "receives the child into his home and openly holds out the child as his natural child."

In *Lisa I. v. Sup.Ct. (Phillip V.)* (Cal. App. Second Dist., Div. 8; October 18, 2005) 133 Cal.App.4th 605, [34 Cal.Rptr.3d 927, 2005 DJDAR 12444] the court concluded that this statute compelled the conclusion that a biological father who had no relationship with the child, had no standing to seek a determination of paternity. The court also held that the statute did not violate the constitutional due process rights of the biological father.

"Ladies Day" is once again before the Supreme Court. In *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, [707 P.2d 195, 219 Cal.Rptr. 133], the Supreme Court held that the Unruh Act (*Civ. Code* § 51) prohibits charging persons of one gender more for goods or services than those of another gender. Relying on *Koire*, the Court of Appeal in *Angelucci v. Century Supper Club* (Cal. App. Second Dist., Div. 5; June 28, 2005) 130 Cal.App.4th 919, [30 Cal.Rptr.3d 460, 2005 DJDAR 7893] held that a supper club violated the Unruh Act by admitting women free or at rates lower than those charged to males. But *Angelucci* nevertheless held for the defendant on grounds that plaintiff could not sue for discrimination where he had failed to ask for the reduced rate himself. The California Supreme Court has now granted hearing in *Angelucci v. Century Supper Club* (Cal.Supr.Ct., Case No. S136154; Oct. 19, 2005) [2005 DJDAR 12521].

Bankruptcy Court has power to suspend lawyer. *Price v. Lehtinen* (*In re Lehtinen*), (U.S. Bankruptcy App. Panel, Ninth Cir.; October 11, 2005) 332 B.R. 404 [2005 DJDAR 12828] held that the Bankruptcy Court had the power to suspend a lawyer from practicing before it. The lawyer had, without the client's consent, sent substitute counsel to a meeting with creditors and failed to appear at the client's confirmation hearing.



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Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Owner of any interest in property is entitled to recreational use immunity. *Civ. Code* § 846 immunizes property owners from liability arising from the recreational use of their property. In *Miller v. Weitzen* (Cal. App Fourth Dist., Div. 1; October 20, 2005) 133 Cal.App.4th 732, [35 Cal.Rptr.3d 73, 2005 DJDAR 12579] defendants, had resurfaced a driveway over property owned by the county over which they had an easement. The county used the property for a horse trail. Plaintiff claimed to have been injured when her horse slipped and fell as a result of the dangerous surface of the driveway. The court rejected plaintiff's argument that the recreational use immunity did not apply because defendants did not own the property. The court pointed out that the statute not only applies to owners but includes anyone who owns any interest in property. Therefore, the owner of an easement is also entitled to the immunity.

Government Claims Act is not limited to tort claims. *Gov. Code* § 810 ff. requires that, before suit may be filed against a state or local public entity, specified claims procedures must be followed. Because the act was enacted in conjunction with the Government Tort Claims Act, there is a common misconception that the claims requirements only apply to tort claims. The Government Claims Act is not so limited. Before filing suit on a contract claim against a public agency, plaintiffs must also comply with the claims procedure. *City of Stockton v. Sup.Ct. (Civic Partners Stockton, LLC.)* (Cal. App. Third Dist.; October 28, 2005) 133 Cal.App.4th 1052, [35 Cal.Rptr.3d 164, 2005 DJDAR 12870].

"Goodwill" belongs to a business and must be transferable. An individual's reputation which creates an expectation of future professional patronage is not "goodwill" that must be valued in a marital dissolution. Such a reputation is to be considered as the individual's earning capacity. "Goodwill" belongs to a business and is transferable. *Marriage of McTiernan* (Cal. App. Second Dist, Div. 8; October 28, 2005) 133 Cal.App.4th 1090, [35 Cal.Rptr.3d 287, 2005 DJDAR 12855].

A statement that is "substantially true" cannot be the basis for defamation. It is hornbook law that truth is a complete defense to an action for defamation or libel. But how close to the truth must the statements be? *Raghavan v. Boeing Co.* (Cal. App. Second Dist, Div. 1; October 31, 2005) 133 Cal.App.4th 1120, [2005 DJDAR 12915], held that it is sufficient if the substance of the allegedly defamatory communication is true, inaccuracies in details do not bar the "truth defense."

The "golden rule" pertaining to summary judgment motions is losing some of its glitter. In *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, [282 Cal.Rptr. 368] the court stated: "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, it does not exist." The case held that a violation of the separate statement of undisputed facts requirement by plaintiff precluded an award of summary judgment in its favor. But in *Parkview Villas Assoc., Inc. v. State Farm Fire and Casualty Co.* (Cal. App. Second, Div. 7; November 2, 2005) 133 Cal.App.4th 1197, [2005 DJDAR 13010], the court applied a different standard where the party *opposing* the motion had filed a defective separate statement. The case held that the trial court abused its discretion by granting the motion because of this failure and that it should have given the party opposing the motion an opportunity to cure the procedural defect. For a further analysis of the applicability of the "golden rule," see *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, [125 Cal.Rptr.2d 499].

Federal standards impose greater duty of care on drivers of commercial vehicles. The standard instruction as to the defendant's duty of care in automobile collision cases imposes a "reasonable" standard. But 49 *Cod.Fed.Reg.* part 392.14 provides: "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist." *Weaver v. Chavez* (Cal. App. Second Dist., Div. 4; November 7, 2005) 133 Cal.App.4th 1350, [2005 DJDAR 13145], reversed a judgment for defendant where the trial court had refused to instruct the jury in accordance with the federal rule and merely given the standard instruction based on *Veh. Code* § 22350, which defines the driver's duty of care as "reasonable or prudent having due regard for weather, visibility, the traffic on and the surface…."

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